

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

LPA No. 1436 of 2018 (O&M)

Date of Decision: 27.11.2018

Sumit Kumar

.....Appellant

versus

Presiding Officer, Industrial Tribunal and Labour Court, U.T. Chandigarh
and another

.....Respondents

**CORAM: HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE
HON'BLE MR. JUSTICE ARUN PALLI, JUDGE**

Present : Mr. Sajjan Singh, Advocate, for the appellant.

KRISHNA MURARI, CHIEF JUSTICE (oral)

Aggrieved by the order dated 06.08.2018 passed by the learned Single Judge not allowing full wages, the appellant-workman has filed this appeal under Clause X of the Letters Patent.

2. Undisputed facts are that the appellant-workman was appointed as a Professional Sales Representative w.e.f. 31.01.2002 in the respondent No.2-company. He was promoted on the post on 11.11.2002 and subsequently promoted as Senior Field Officer on 30.04.2004. He remained under the employment from 2002 to 2007 and his services were terminated on 06.01.2007 on account of his alleged absence from duty from 31.12.2006 to 07.01.2007 i.e. for only 7 days. The management terminated his services without issuing any charge sheet or initiating any enquiry proceedings treating it to be a case of abandonment of service.

3. An industrial dispute was raised which was referred to for adjudication by the Labour Court. Vide award dated 17.02.2014 the Labour Court allowed the reference and answered the same in favour of the

appellant-workman holding that there was no abandonment of service by the appellant-workman and his services were terminated by the Management without any show cause notice or disciplinary proceedings and without following the procedure prescribed in Section 25(F) of the Industrial Disputes Act, 1947 and accordingly directed reinstatement in service with 25% of his basic pay as back wages payable from the date of demand till the date of award.

4. Aggrieved by not allowing continuity of service and full back wages and other consequential benefits, the appellant-workman filed the writ petition.

5. Learned Single Judge finding that 25% of the basic pay as back wages awarded by the Labour Court was devoid of any reasoning and showed non-application of judicial mind and once termination of the appellant-petitioner was held to be illegal by the Labour Court, he was entitled to consequential benefits of reinstatement with continuity of service. Learned Single Judge accordingly allowed the writ petition and modified the award to the effect that the appellant-workman shall be entitled to reinstatement in service with continuity and 50% of the back wages from the date of demand notice till reinstatement. Aggrieved by the denial of full wages by the learned Single Judge, the present appeal has been preferred.

6. Learned counsel for the workman-appellant contended that the impugned judgment passed by the learned Single Judge is also devoid of any reasons as to why the workman-appellant was being denied 50% of back wages though he was entitled to full wages as the termination was held to be illegal. It is further submitted that the learned Single Judge has committed the same mistake in awarding only 50% of back wages without assigning

any reasons as was done by the Labour Court for payment of 25% of back pay as back wages.

7. In the light of the facts enumerated above and the arguments advanced, the issue which arises for consideration is whether the appellant-workman is entitled to full back wages for the period he was kept out of service by respondent No.2-Management.

8. The issue of payment of back wages on reinstatement for the period the appellant-workman remained out of service came up for consideration before a Bench of three Judges of the Hon'ble Supreme Court in case ***Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (1979) 2 SCC 80***. The Court after examining the issue held as under:-

“It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The specter of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault

of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.”

9. The issue was also answered by another three Judges Bench in the case of ***Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi, (1980) 4 SCC 443***, in the following words:-

“..... Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted.”

10. Again in the case of ***U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey 2006(1) S.C.C. 479*** the Apex Court has held as under:-

“No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act.”

11. In the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya 2013(10) SCC 324*, the Apex Court after analyzing catena of decisions including two decisions referred to above observed that:-

“The propositions which can be culled out from the aforementioned judgments are:

In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best

legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in ***Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53]***”

12. Tested on the touch stone of the above principles settled by the Supreme Court, the judgment of the Labour Court awarding 25% of the back wages only without continuity of service and without recording any reason, it cannot be said that power has been exercised in a judicial and judicious manner and thus the learned Single Judge rightly allowed the writ petition and modified the award.

13. The issue still remains to be considered as to whether the learned Single Judge can be said to be justified in awarding only 50% of the back wages. Though the learned Single Judge has not given any reason for denying full back wages and awarding 50% back wages but in the facts and circumstances we find the same to be justified for the following facts and reasons:-

- i) Admittedly the workman-appellant absented himself from duty for 7 days without any lawful authority which led to passing the order of termination. It cannot be said that there was absolutely no fault of the workman. It is entirely different that the respondent-management also committed an illegality in not proceeding against the appellant-workman in accordance with the prescribed procedure and wrongly terminated his services treating it to be a case of abandonment.

- ii) No material has been brought on record by the appellant-workman to show that any averment was made in the pleadings before the Labour Court with respect to not being gainfully employed during the period he remained out of service. Though it is hard to believe that a person well qualified holding a post of Senior Field Officer would remain idle for such a long period but in the absence of any pleadings and material evidence brought on record by either side, we cannot draw any presumption and thus the learned Single Judge appears to be justified in awarding 50% of the back wages alongwith continuity of service.

14. In the aforesaid facts and reasons, the impugned judgment passed by the learned Single Judge does not call for any interference and the appeal accordingly stands dismissed in limine.

(KRISHNA MURARI)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

27.11.2018
ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No